Supreme Court, U.S.
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No. 98-1796

In The

Supreme Court of the United States

AMERICAN LIFE &
CASUALTY INSURANCE COMPANY,

Petitioner,

v.

ANNE C. TROSTEL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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RULE 29.6 STATEMENT

American Life and Casualty Insurance Company (ALCIC), now known as Conseco Annuity Assurance Company (CAAC), owns 98% of Vulcan Life Insurance Co. CAAC's parent is Jefferson National Life of Texas, which is wholly owned by CIHC Incorporated. CIHC Incorporated is wholly owned by Conseco, Inc. Conseco, Inc. is a publicly traded corporation.

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REPLY BRIEF FOR THE PETITIONER

Respondents' Brief in Opposition ("Opp.") fails to contest, and thus effectively concedes, several key issues that demonstrate that plenary review is amply warranted in this case. Specifically, Respondents do not deny that the Eighth Circuit's interpretation of the federal statute governing gold clauses cannot be squared with its plain language and purpose; that the Eighth and Ninth Circuits have given the statutory term "issue" diametrically opposed meanings with respect to bonds and leases even though there is no justification in the statute for this split in approach; that the Eighth Circuit's approach makes the meaning of a federal law dependent on state common law where suit is brought; and that under the Eighth Circuit's decision, unwitting assignees of long-term leases containing gold clauses will be subject to dramatic and unintended increases in their rental obligations.

Despite these major concessions, Respondents do advance several specific arguments that warrant a brief reply.

1. Unable to deny the significance of the issues presented by this case, Respondents' principal argument is that the petition for certiorari is "redundant" because the issues raised in the questions presented were resolved by the Eighth Circuit in its prior decision in *Trostel II*. Opp. at 7. Respondents contend that this Court's prior denial of certiorari to review the interlocutory order entered by the Eighth Circuit in *Trostel II* precludes review of these issues. Yet, it is well established that the lack of finality in

the judgment below may "of itself alone furnish[ ] sufficient ground for the denial of the application" for certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Consequently, this Court has repeatedly recognized that the denial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from the final judgment. *See, e.g., id.; Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring) ("Our action does not, of course, preclude [petitioner] from raising the same issues in a later petition, after final judgment has been rendered.").

Respondents seek to avoid these settled principles by claiming that the order that was the subject of the prior petition for certiorari was not interlocutory. Respondents candidly acknowledge that this prior order remanded the case to the district court for a "factual inquiry" as to the "meaning of the terms of the gold clause" in order to determine the amount of rent due. Opp. at 7. Respondents neglect to mention, however, that the import of these proceedings on remand was to determine whether Petitioner's rent was to remain unchanged or was to be increased twenty-fold. Given the significance of this issue and the prospect that its resolution on remand would render application of the gold clause largely inconsequential, Respondents' contention that the order "end[ed] litigation on the merits" is plainly incorrect, as the Eighth Circuit's order in no way represented a final determination of the merits of this case. Opp. at 7. Indeed, in similar contexts, this Court has concluded that an order requiring a remand on a remedial issue is interlocutory. *See, e.g., Hamilton-Brown Shoe*, 240 U.S. at 258; *Brotherhood*

of Locomotive Firemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this Court"); *see also Virginia Military Inst.*, 508 U.S. at 946 (decision below not final where Court of Appeals "remanded the case to the District Court for a determination of an appropriate remedy").[1] In short, the issues set forth in the questions presented are properly before this Court.

2. The decision below clearly conflicts with this Court's approach to common-law terms used in federal statutes. A federal court interpreting a federal statute does not apply the common law of the individual state where the dispute arises as if it were sitting in diversity. Rather, it must arrive at a uniform meaning of the common-law term consistent with the text and purpose of the federal law. *Reves v. Ernst & Young*, 494 U.S. 56, 71 (1990) ("We are unpersuaded that Congress intended the Securities Acts to apply differently to the same transactions

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[1] Respondents' reliance upon *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988), is misplaced. In that case, the Court merely concluded that a final decision had been rendered when the only remaining issue related to the amount of attorney's fees to be awarded to the *prevailing* party. The Court's decision in *Budinich* offers no support to Respondents' contention that an order requiring a remand as to the proper interpretation of a contract and the amount of damages due under that contract is final.

depending on the accident of which State's law happens to apply.").[2]

Respondents continue to defend the Eighth Circuit's complete reliance on Iowa law in this case. Opp. at 13-14. In a footnote, Respondents assure this Court that the law of novation is "reasonably consistent" among the several states, Opp. at 12-13 n.3, and therefore poses no threat of inconsistent results under section 5118(d)(2).

Nothing could be further from the truth. As the district court noted in *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990), jurisdictions are split on whether consent to a novation must be contemporaneously made by all parties or may be made in advance by one or both parties. *Fay*, 646 F. Supp. at 951-52. *Compare Scott v. Wyoming Oils*, 75

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[2] Respondents cite *United States v. Shabani*, 513 U.S. 10, 13 (1994), for the unremarkable proposition that when Congress uses a common-law term, "absent contrary indications" it intends to adopt the common-law definition of that term. Opp. at 14. *Shabani* held that the conspiracy provisions of 21 U.S.C. § 846 adopted the common-law rule that no overt act need be proved to complete the crime of conspiracy. *Shabani* does not help Respondents here. In fact, if Respondents' view had prevailed in *Shabani*, whether or not the federal drug conspiracy statute required proof of an overt act would have depended on the law of conspiracy in the state where the crime was committed. Moreover, as this Court has recognized, common-law terms in federal statutes must be interpreted consistent with the text and purpose of the federal law. *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) ("[C]ommon-law principles may not be transferable in all their particulars to Title VII."). Here, the common law of contract in Iowa has been applied to defeat the purpose of the federal statute.

P.2d 764 (Wyo. 1938) (consent to novation must be made at time of substitution), *and Emerson-Brantingham Implement Co. v. Sawyer*, 242 S.W. 1007 (Mo. Ct. App. 1922) (same), *with Shadeland Dev. Corp. v. Meek*, 489 N.E.2d 1192 (Ind. App. 1986) (lessor may agree to novation in advance in lease contract), *and Sans Souci v. Division of Florida Land Sales & Condominiums*, 421 So. 2d 623 (Fla. Dist. Ct. App. 1982) (explicitly disagreeing with Wyoming Supreme Court in *Scott* in holding no need for contemporaneous consent of parties for a novation).

This difference in state contract law would affect the outcome in this very case. The Court of Appeals found the lessor's consent to a novation in a clause contained in the original 1917 lease. *Trostel I*, App. 38a n.8. In other states a different result would obtain because there must be contemporaneous consent by all parties to a novation. Congress cannot have intended the application of section 5118(d)(2) to turn on these vagaries of state contract law.

3. Respondents attempt to explain away the widely disparate applications of section 5118(d)(2) in the federal and state courts by reference to the differences in state common law in the various states where the disputes arose. Opp. at 11-13. The attempt only highlights the need for this Court to grant review and arrive at a uniform federal interpretation of the words "obligation issued" contained in section 5118(d)(2).

For example, *Grand Avenue Partners, L.P. v. Goodan*, 160 F.3d 580 (9th Cir. 1998), involved a long-term commercial lease like the one at issue in this case. *Grand Avenue Partners* also involved a corporate reassignment of

the lease pursuant to a clause authorizing such reassignment without the contemporaneous consent of the lessor. As in this case, no reference was made to the gold clause in the post-1977 reassignment. Yet, section 5118(d)(2) operates to create gold clause liability in this case and not in *Grand Avenue Partners*. Respondents argue this result is proper under California and Iowa contract law and the distinction between an assignment and a novation. Opp. at 11.

Under a uniform federal interpretation of the phrase "obligation issued" with reference to the purposes of the statute, there would be no gold clause liability in either *Grand Avenue Partners* or this case, because the only obligation "issued" was the original pre-1933 lease containing an unenforceable gold clause. No new obligation "issued" because, as a matter of federal law, such a new obligation must entail an *agreement* – a meeting of the minds – with respect to the gold clause to be bound by a new gold clause obligation. Only this interpretation is consistent with the common-law definition of "issued" and the federal purpose behind the law, namely, to allow contracting parties to *knowingly choose to employ* gold clauses after 1977.

Similarly, Respondents attempt to explain away the conflicting results in bond cases by reference to common-law distinctions between bonds and leases that "required a different conclusion regarding the date of their 'issuance' for the purposes of section 5118(d)(2)." Opp. at 10 (citation and footnote omitted). Again, this proves Petitioner's point. Under Respondents' view, the word

"issue" in section 5118(d)(2) becomes a linguistic chameleon that changes meaning depending on the State and the type of "obligation" involved.

Neither the Ninth Circuit's decision in *Adams v. Burlington N. R.R. Co.*, 80 F.3d 1377 (9th Cir.), *cert. denied*, 519 U.S. 864 (1996), nor the Alaska Supreme Court's decision in *Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry. Co.*, 649 P.2d 947 (Alaska 1982), can be reconciled with the Eighth Circuit's approach in this case. In *Adams*, the plaintiffs could point to many supplemental indentures executed by successors in interest to the original issuers of the bonds which unequivocally assumed all the obligations and liabilities associated with the bonds. *See Adams*, 80 F.3d at 1379 (assignee executed 1987 Supplemental Indenture that obligated it to assume all payments under the bonds "according to their tenor . . . "). This is exactly the type of complete substitution of a party and complete adoption of all provisions of the previous contract that the court below found to be a novation and therefore to constitute a new "obligation issued" after 1977 under section 5118(d)(2). The *Adams* court, however, rejected the "novation" approach and held that "bonds are 'issued' within the meaning of the 1977 amendment when they are delivered to the first holder." 80 F.3d at 1381. *Adams* reached this result, at least in part, by looking to the language and purpose of the federal statute. *Id.* at 1380-81.

Similarly, in *Gold Bondholders* the Alaska Supreme Court rejected the argument that a transfer of a pre-1933 gold bond constituted a novation and therefore the issuance of a new obligation containing a gold clause. Despite the fact that the bonds contemplated issuance of a "new

registered bond" to a transferee upon surrender of the old bond, the court refused to find a new issuance under section 5118(d)(2). The court noted that the "new registered bond" clause was "drafted in 1895, and it was the purpose of Congress in enacting 31 U.S.C. § 463 to vitiate such obligations insofar as they required payment in gold specie. We are unpersuaded by appellants' argument that the bonds were first issued to them in 1980 and that, therefore, they come within the provisions of the 1977 act." 649 P.2d at 950-51. The Alaska Supreme Court's reasoning is obviously not limited to bonds. It applies to all unwitting "novations" based on assignment clauses drafted prior to 1933. Respondents cannot dispute the fact that this case would have been decided differently if brought before an Alaska court.

4. Finally, Respondents seek to shield the Eighth Circuit's decision from review by attempting to minimize the importance of this case. Significantly, Respondents do not dispute that there are numerous long-term leases, many running well into the next century, that will be affected by the disposition of this case. *See* Petition at 23 n.4. Nor do Respondents contest the fact that the Eighth Circuit's decision will operate to saddle the unwitting assignees of these leases with dramatic and unintended rental increases. Indeed, under the Eighth Circuit's decision, even prospective tenants who are fully aware of the otherwise moribund gold clauses will not be able to avoid reviving the gold clause obligations if they assume such a lease. *See* Petition at 24. Nevertheless, Respondents wistfully posit that landlords will not utilize this leverage to dictate terms to their tenants and prospective assignees. Yet, there is every reason to believe that the commercial

market for real property covered by such long-term leases either will be frozen entirely or will be distorted by the demands of lessors armed with ancient gold clauses and the Eighth Circuit's decision.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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